Supreme Court, U.S.
FILED
JUN 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1648

In the Supreme Court of the United States

OCTOBER TERM, 1988

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,
PETITIONER

v.

ROBERT T. NANCE AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an employer who settles a compensation claim under the Longshore and Harbor Workers' Compensation Act violates the anti-discrimination provision of the Act by terminating the claimant's employment because of the employer's fear of friction and hostility associated with the claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-15a) is reported at 858 F.2d 182. The decision of the Benefits Review Board (Pet. App. 16a-21a) is reported at 20 Ben. Rev. Bd. Serv. (MB) 109. The decision of the administrative law judge (Pet. App. 22a-37a) is reported at 19 Ben. Rev. Bd. Serv. (MB) 115 (ALJ).

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1988. A petition for rehearing was denied on January 9, 1989 (Pet. App. 1a). The petition for a

writ of certiorari was filed on April 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Norfolk Shipbuilding and Drydock Corporation employed respondent Robert T. Nance as an electrician at various times from 1947 through March 1982 (Pet. App. 2a, 16a, 23a). Between 1975 and 1981, Nance filed several claims with the United States Department of Labor under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, seeking disability compensation from petitioner for workplace injuries to his knee, leg, and back (Pet. App. 23a). On January 13, 1983, petitioner and Nance agreed to settle Nance's claims for a lump-sum payment of $25,000, plus attorney's fees and costs (*id.* at 3a, 16a-17a, 23a-25a). The Labor Department's deputy commissioner promptly approved the settlement under Section 8(i) of the Act, 33 U.S.C. 908(i) (1982 & Supp. V 1987). See Pet. App. 3a-4a, 17a, 25a-26a. Nance received his lump-sum payment in February 1983 (*id.* at 17a).

On March 7, 1983, petitioner notified Nance by letter that his employer-sponsored health and life insurance had been cancelled effective March 1, 1983 (Pet. App. 4a, 17a, 26a). Since Nance was on layoff status at the time, that letter was his only formal notice that petitioner was terminating his employment (*ibid.*). Nance subsequently challenged that action by filing a discrimination complaint

against petitioner pursuant to Section 49 of the LHWCA, 33 U.S.C. 948a (1982 & Supp. V 1987). Pet. App. 17a.[1]

2. Petitioner attempted to introduce evidence at the administrative hearing that Nance had verbally agreed to his termination as part of the settlement of his LHWCA claims (Pet. App. 4a, 17a, 32a); Nance denied the existence of any such agreement (*id.* at 4a, 26a). The Department of Labor administrative law judge (ALJ) refused to admit petitioner's evidence on the ground that the written settlement application filed with the deputy commissioner (which made no mention of Nance's discharge) constituted the entire agreement between the parties (*id.* at 4a-5a, 17a, 32-33a).

The ALJ, however, allowed petitioner's officials to testify about their understanding of the settlement agreement and the impact, if any, of that understanding on the decision to terminate Nance's employment (Pet. App. 5a, 17a-18a, 33a). Those witnesses indicated that petitioner had followed a consistent policy of securing an

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[1] Section 49 of the LHWCA, 33 U.S.C. 948a (1982 & Supp. V 1987), provides in relevant part:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against any employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. * * * Any employer who violates this section shall be liable to a penalty of not less than $1,000 or more than $5,000, as may be determined by the deputy commissioner. * * * Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination * * * .

employee's voluntary termination as part of any lump-sum settlement of an LHWCA claim (*id.* at 5a, 19a-20a, 34a-35a). Petitioner based that policy on its desire to begin anew with a "clean slate" free of the hostility that a disputed benefit claim engendered (*ibid.*). In response to further questioning, petitioner's director of safety and workers' compensation admitted that there had been friction between petitioner and Nance because of the latter's history of LHWCA claims, and that petitioner had wished to be rid of Nance for that reason (*id.* at 5a, 35a).

Following the hearing, the ALJ ordered petitioner to reinstate Nance with back wages and to pay a civil penalty to the deputy commissioner (Pet. App. 37a). The ALJ found that several of petitioner's representatives believed Nance had agreed to quit as part of the settlement (*id.* at 34a) and further found that petitioner's insistence on securing a voluntary termination from Nance because of his history of workers' compensation claims demonstrated a retaliatory intent sufficient to violate Section 49 of the LHWCA (Pet. App. 35a). Since there was evidence of specific animus against Nance, the ALJ did not consider whether a general policy of conditioning settlements on voluntary termination would violate the Act (*id.* at 35a-36a).

3. The Benefits Review Board affirmed the ALJ's finding of a Section 49 violation, holding the evidence sufficient to establish that petitioner had discharged Nance as a result of his LHWCA claim (Pet. App. 16a-21a). The Board rejected petitioner's argument that it had not intended to discriminate against Nance because it believed that he had consented to his own termination (*id.* at 19a). The Board concluded that petitioner's

practice of routinely seeking voluntary termination agreements before settling LHWCA claims supported the ALJ's finding that petitioner had a general animus against all LHWCA claimants (*id.* at 19a-20a). Since petitioner discharged Nance even though the approved settlement agreement made no mention of a voluntary termination, the Board concluded that petitioner's decision was based solely on its "admitted policy to retain no employee who enters into a settlement of his compensation claim" (*id.* at 20a).

4. The court of appeals affirmed the Benefits Review Board's decision (Pet. App. 2a-10a). The court first concluded that under the LHWCA and applicable regulations, the written settlement application submitted to the deputy commissioner must include all agreements between the employer and the claimant. It accordingly held that the ALJ properly excluded parol evidence of a voluntary termination agreement. *Id.* at 7a-9a. The court then upheld the ALJ's finding of discriminatory intent. The court concluded that petitioner's general policy of seeking voluntary termination agreements and its specific desire to obtain such an agreement from Nance both were "highly probative as to whether Norfolk had the requisite discriminatory intent in discharging Nance" (*id.* at 9a). The court explained that petitioner's desire to "'clean the slate'" of friction or hostility arising from Nance's compensation claim was substantial evidence of discriminatory intent "[w]hether or not such an agreement was entered into" (*ibid.*).

Judge Murnaghan dissented (Pet. App. 10a-15a). He did not dispute that the written settlement submitted to the deputy commissioner constituted the entire agreement between the parties. He disagreed, however, with the

"finding of discriminatory intent under the facts of the present case" (*id.* at 12a).[2]

ARGUMENT

The court of appeals affirmed the decision of the Benefits Review Board and the ALJ that petitioner's termination of its employee was motivated by a discriminatory intent. That fact-based decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review accordingly is not warranted.

1. A discrimination claim under Section 49 of the LHWCA consists of two elements: (1) the employer must commit a discriminatory act; and (2) the discrimination must be motivated by animus against the employee because of his pursuit of rights under the LHWCA. *Holliman* v. *Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 761 (4th Cir. 1988); *Geddes* v. *Benefits Review Bd.*, 735 F.2d 1412, 1415 (D.C. Cir. 1984). The record in this case shows that petitioner had a firm policy against retaining employees who settled claims under the

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[2] We believe that the Director, Office of Workers' Compensation Programs, was a party in the court of appeals, even though he did not actively participate in the proceedings, and is therefore an appropriate respondent to the petition for a writ of certiorari under Rule 19.6 of this Court. See *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 485 (D.C. Cir. 1982) ("the Director, OWCP shall be named as federal party-respondent in all petitions for review brought under section 21(c) of the LHWCA, 33 U.S.C. § 921(c)"); 20 C.F.R. 802.410(b) ("[t]he Director * * * shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA"). But see *I.T.O. Corp.* v. *Benefits Review Bd.*, 542 F.2d 903, 909 (4th Cir. 1976), cert. denied, 433 U.S. 908 (1977).

LHWCA and that petitioner terminated Nance's employment immediately after settling his compensation claims. Indeed, petitioner's representatives expressly stated that they wanted Nance out of the company because his departure would "clean [the] slate" of the hostility caused by Nance's history of compensation claims (Pet. App. 5a, 28a n.2). Therefore, it is clear from the evidentiary record that Nance lost his job because of petitioner's animus against him for exercising his rights under the LHWCA.[3]

While petitioner does not dispute these factual findings, it nevertheless contends (Pet. 6-11) that the court of appeals erred by sustaining a charge of unlawful discrimination based solely on petitioner's "generalized" animus against LHWCA claimants as a class. That contention is incorrect. As indicated above, the court of appeals did not base its decision solely on petitioner's

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[3] Petitioner suggests (Pet. 6-7) that it did not have a discriminatory intent in this case because its representatives subjectively believed that Nance had agreed, as part of his LHWCA settlement, to quit voluntarily. The court of appeals, the Benefits Review Board, and the ALJ all rejected that argument. Indeed, the court of appeals expressly stated (Pet. App. 9a) that "[w]hether or not such an agreement was entered into," petitioner's testimony on its goal in seeking such an agreement was "substantial evidence of discriminatory intent."

Moreover, petitioner's workers' compensation representatives can reasonably be charged with knowledge of the Department of Labor's requirement that an LHWCA settlement must include a full description of the terms of the agreement. See Pet. App. 7a (describing statutory and regulatory provisions). They were not entitled to pursue a policy of terminating a claimant's employment in the face of a written settlement agreement that did not include that term.

general animus. It expressly relied, as did the ALJ, on petitioner's specific "desire to enter into such an agreement *in the case of Nance* to 'clean the slate' of friction or hostility associated with *his* claim" (Pet. App. 9a (emphasis added)). See *id.* at 34a-35a. The court recognized, as did the ALJ, that petitioner's general hostility toward LHWCA claimants provided *evidence* of petitioner's specific animus in this case. See *id.* at 9a, 33a-34a, 34a-35a.[4]

Petitioner cites no decision of this Court or any court of appeals (including the court below) holding that evidence of a general antipathy toward LHWCA claimants cannot be used as evidence to prove discriminatory intent in a particular case. Petitioner's reliance (Pet. 5, 7, 10-11) on *Holliman* and *Geddes* is entirely misplaced. Those decisions merely stand for the proposition that a discriminatory act prohibited by Section 49 of the LHWCA must result, at least in part, from the employee's filing of a compensation claim. Neither the Fourth Circuit in *Holliman* nor the D.C. Circuit in *Geddes* considered whether evidence of general animus may be used to prove unlawful intent.[5]

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[4] The court of appeals also recognized that the evidence was "highly probative" (Pet. App. 9a). Indeed, the testimony before the ALJ revealed that the "generalized" animus here was not some vague, unmanifested dislike for workers' compensation claimants, but a firm conviction that contested compensation claims generate such hostility on the part of petitioner's managers that the claimant must agree to leave the company in order to qualify for a settlement.

[5] As petitioner observes (Pet. 8-10), there is authority under other statutes (*e.g.*, the National Labor Relations Act, 29 U.S.C. 151 *et seq.*) that an employer's general hostility toward protected activity,

2. Petitioner also argues (Pet. 5, 11-14) that the court of appeals' decision requires review because it effectively holds LHWCA settlements that include voluntary termination agreements to be *per se* unlawful under the LHWCA and therefore conflicts with precedents favoring settlement of employment discrimination claims under other statutes. The decision below cannot support that argument, however, because the court of appeals specifically found it unnecessary to rule on whether all such agreements are unlawful. The court recognized that petitioner had a general policy of seeking voluntary termination agreements, but further stated:

> Because we conclude that the ALJ correctly excluded the proffered evidence of the alleged oral agreement, and because we conclude that there was substantial evidence to support the finding of a violation of § 49 of the Act, we do not address the broader question of whether the Board erred as a matter of law in holding Norfolk's general policy to be a violation of § 49.

Pet. App. 6a.[6] As we have explained, the written

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taken by itself, does not establish unlawful motivation. See, *e.g.*, *NLRB* v. *Selwyn Shoe Mfg. Corp.*, 428 F.2d 217, 223 (8th Cir. 1970); *Nix* v. *NLRB*, 418 F.2d 1001, 1006 (5th Cir. 1969). However, none of the cases cited by petitioner supports the contention that an employer's hostility toward a protected class, as manifested by a general policy or practice, cannot be used as *evidence* of the employer's motivation for action taken against a given individual.

[6] Petitioner is also mistaken in contending (Pet. 11) that the Board held voluntary termination agreements to be *per se* illegal. The Board stated only that petitioner's unyielding policy of requiring

settlement that the deputy commissioner approved did not incorporate a voluntary termination agreement. Thus, this case presents no occasion for considering the legality of such agreements.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JUNE 1989

LHWCA claimants to relinquish their jobs in return for a settlement of their claims is unconscionable and contrary to the purposes of the Act (see Pet. App. 21a). The Board did not state that voluntary termination agreements are always illegal.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699:00293